Ficalora v. International Business Machines Corporation, No. 96-35229

PREGERSON, Circuit Judge, dissenting:

I dissent. The majority fails adequately to consider the critical issue facing us in this case: Was there "satisfactory proof to IBM that a disability from any cause prevented [Ficalora from] the taking of any employment for pay or profit?"[1] It is undisputed that Ficalora suffered from a severe case of multiple sclerosis ("MS"), a devastating physical illness.[2] It is also undisputed that the Social Security Administration considered Ficalora disabled and awarded him disability benefits and that several medical doctors documented the severe effects that MS had on Ficalora's health. I submit that the Plan Administrator

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[1]This is the standard Ficalora had to meet to be eligible for benefits under the IBM Medical Disability Income Plan.

[2]Multiple sclerosis is a disorder of the nervous system for which there is no known cure. Hughes v. Boston Mutual Life Ins. Co., 26 F.3d 264, 266 (1st Cir. 1994). Symptoms include weakness, fatigue, loss of coordination, depression, and stiffness or weakness in the lower extremities. Id. Fatigue "commonly occurs as the principal presenting symptom of the disease and is a frequent cause for unemployment in MS patients." Weinshenker, et al., A Double-Blind, Randomized Crossover Trial of Pemoline in Fatigue Associated with Multiple-Sclerosis, 1648 Neurology 42, August 1992.

abused his discretion in failing to conclude that Ficalora presented "satisfactory proof" that his chronic MS prevents him from taking any employment for pay or profit.

I

Before describing the evidence before the Plan Administrator, it is important to understand how IBM employees might qualify for disability benefits under the IBM Medical Disability Income Plan ("Disability Plan"). An employee is deemed medically disabled when he or she can meet the following test: "An employee will be considered disabled by giving satisfactory proof to IBM that a disability from any cause prevents the taking of any employment for pay or profit."

To apply for benefits under the Disability Plan, an applicant must submit an application to the IBM medical department. Two IBM officials, the Area Managing Physician and the Area Personnel Manager, prepare the applicant's application for disability benefits. Sometimes the Area Managing Physician arranges for the applicant to be evaluated by medical consultants selected by IBM. After taking all these steps, the Area Managing Physician assembles the administrative record[3] that will be considered

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[3]The administrative record consists of the application; the IBM medical file; the Area Managing Physician's written summary of the application, recommendation, and supporting medical documentation;

in deciding whether to grant the applicant's request for disability benefits.

The administrative record is forwarded to an IBM official called the Medical Director, who could approve the application or forward the administrative record to the Disability Plan Panel. The Disability Plan panel then makes a recommendation to the Plan Administrator whether to grant disability benefits under the Plan to the applicant. The Plan Administrator is ultimately responsible for issuing a benefits decision.

An employee may request review of a benefits denial by the Plan Administrator. The Plan Administrator is then required to issue a notice describing the result of his review within 60 days of the request for review.

II

In March 1980, IBM employed Ficalora as a supply room clerk. Over the course of several years, Ficalora was promoted to increasingly more responsible positions until he became an Accounts Systems Engineer. In December 1988, while still employed by IBM, Ficalora experienced pain and loss of vision in his right eye. Ficalora consulted

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reports from the applicant's physicians; reports from IBM consultants; the applicant's last three performance appraisals; the applicant's work history and profile; and any other relevant documents.

an optometrist, who referred him to a neurologist because of the possibility that Ficalora might suffer from MS.

Over the next few years, Ficalora's vision improved. By May, 1991, however, Ficalora developed other symptoms:

> [Ficalora] developed a band of numbness around his body at the level of the umbilicus which spread to the genitalia and legs and feet. Then shortly after he was nauseated, developed urgency and frequency, fatiguability and problems with his memory.

In June 1991, Ficalora went to see Dr. Roy L. Swank of the Swank Multiple Sclerosis Clinic of Oregon Health Sciences University, who diagnosed him with MS. Dr. Swank "recommended to [Ficalora] that he apply for retirement."

Ficalora began to miss work frequently. On June 18, 1991, Ficalora wrote to Austin Blood, an IBM Branch Manager, to request Disability Plan benefits. In response to Ficalora's request for benefits under the Disability Plan, on June 26, 1991, Dr. Charles Grose, IBM's Western Area Medical Director, wrote a letter asking Dr. Swank for a "summary of [his] evaluation of [Ficalora], including [his] diagnosis, the extent of [Ficalora's] disability, recommended treatment, and prognosis." On July 9, 1991, after examining Ficalora, Dr. Swank wrote:

> [Ficalora] is very sensitive to stress, as are all M.S. patients, and in his case, memory and clarity of

> thought are inclined to suffer. Considering the type of work [he] does, I do not believe he will be able to continue to do satisfactory work. However, he might be able to carry on at half-time, and that would perhaps be better for [him] as a first step towards retirement.

Starting in August, 1991, Ficalora tried to work half days, three days a week, and was reassigned by his manager to a position that involved less customer interaction. However, Ficalora's new job proved to be very stressful, and he began to experience exacerbated fatigue, burning in his feet, dizziness, nausea, and head and leg aches.

On October 4, 1991, Ficalora was examined by Dr. Philip Swanson, an IBM-selected neurologist at the University of Washington Medical Center.[4] In his report, dated October 23, 1991, Dr. Swanson stated:

> [W]e do not have firm, solid evidence that MS is the diagnosis, though I have no reason to doubt that in view of the other sensory symptoms that he has had, from time to time. I, therefore, think it is more probable than not that MS is, indeed the correct diagnosis.

Meanwhile, because of Ficalora's fatigue, he continued to he unable to perform his job. Ficalora's supervisor informed him that he should discontinue work

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[4]Dr. Swanson also reviewed Ficalora's medical record, and the evaluations of Drs. Almaraz and Swank.

pending review of his eligibility for benefits under the Disability Plan.

In a phone conversation between Dr. Swank and an IBM doctor, Dr. Swank stated that Ficalora could only work a few hours per day, and expressed the opinion that Ficalora was "disabled now [and] in the foreseeable future."

IBM then selected another doctor, a psychiatrist named Dr. Jason McLurg, to examine Ficalora. IBM did not ask Dr. McLurg to evaluate whether Ficalora could take any employment for pay or profit, the standard under the Disability Plan. Rather, IBM requested that Dr. McLurg's report contain an evaluation of whether there was a psychiatric component to Ficalora's fatigue, as well as any recommendations for treatment. After examining Ficalora, Dr. McLurg stated that Ficalora had a "probable diagnosis of a devastating physical disorder, multiple sclerosis," and observed that Ficalora was not taking the diagnosis of MS "laying down," but rather, "was trying to get the most out of his life and to treat his body in the best way possible to minimize the effects of the disease." Dr. McLurg recommended an MRI scan to confirm the diagnosis of MS, and a trial of Prozac "to see if Ficalora's energy or endurance could be improved."

In March 1992, Dr. Grose and Dr. Steven Redmond (IBM's Western Area Medical Director and Western

Region Managing Physician, respectively) forwarded Ficalora's application to IBM's United States Medical Director, Dr. Arnold J. Kaminer. Drs. Grose and Redmond did not examine Ficalora. Rather, upon reviewing his medical records, the doctors recommended that Ficalora's application for benefits be denied, primarily because there was not "sufficient objective evidence that [Ficalora] is disabled." The United States Medical Director also recommended that Ficalora's request be denied. These recommendations and the administrative record were forwarded to the Disability Plan panel.

On May 20, 1992, the Disability Plan panel rejected Ficalora's application because "the medical evidence does not support a disabling condition." Sometime later, the Plan Administrator decided to deny Ficalora benefits.

Meanwhile, on May 17, 1992, the Social Security Administration advised Ficalora that he was considered disabled by MS as of June 1, 1991, and awarded him disability benefits. The Social Security Administration disability examiner found Ficalora "incapable of performing any past relevant work," and "restricted by his residual functional capacity to less than sedentary work.,,

On June 12, 1992, Ficalora received IBM's formal letter denying him benefits. The letter stated the following two reasons for the denial, among others:

The evidence in your case was insufficient to prove disability and a cause of disability to the satisfaction of IBM because:

(a) it did not include objective medical evidence sufficient to definitively establish the presence of a specific disease entity of a type which can be totally disabling.

. . .

(b) it did not include objective medical evidence of impairment sufficiently severe as to make you incapable of taking any employment for pay or profit . . . . (We note in passing that, even if you do have multiple sclerosis, this does not necessarily make you unable to work, as in some cases multiple sclerosis takes a relatively mild course.)

. . .

You have complained of symptoms such as fatigue, head pains, nausea, joint aches, intermittent numbness, and frequency of urination. However, IBM does not consider symptom reports to be satisfactory evidence of disability unless accompanied by objective medical evidence of an underlying medical condition that would account for the reported symptoms to be disabling in degree. The sufficient objective medical evidence presented thus far in your case was not sufficient to support the claimed symptoms and a disabling degree of severity.

On June 19, 1992. Ficalora decided to undergo a Magnetic Resonance Imaging (MRI) scan.[5] The scan revealed "extensive bilateral demyelinating plaque disease."

On August 3, 1992, Ficalora underwent an examination by Dr. Richard Blanck, a neurologist. Dr. Blanck diagnosed Ficalora with MS, and observed the following:

> His symptoms and signs include burning paresthesias in his feet, lower extremity spasticity, walking difficulty secondary to generalized weakness and easy fatigability and visual difficulty. MS is a chronic, progressive neurologic disorder. His prognosis is guarded and the patient's physical limitations are permanent from a medical standpoint.

On August 7, 1992, Ficalora requested the Plan Administrator to review the denial of his claim for disability benefits. Ficalora sent new evidence in support of his request for review, including his MRI and Dr. Blanck's August 3, 1992, report. Ficalora also sent to the Plan Administrator an August 18, 1992, report authored by Dr. Blanck, that confirmed Ficalora's problems of "generalized weakness and easy fatigueability, walking difficulty

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[5]MRI scans are the "most valuable investigative tool in diagnosing MS." David H. Miller, M.D., Magnetic Resonance Imaging in the Diagnosis of Multiple Sclerosis In an MRI scan of a person with MS, white matter lesions or plaques are present in parts of the brain.

because of lower extremity weakness, burning in his feet and spasms that occur intermittently involving the left leg."

In response, the Plan Administrator asked Ficalora on August 28, 1992, to authorize the release of medical records from Dr. Blanck and the Social Security Administration. Ficalora complied with this request.

In the August 28, 1992, letter, the Plan Administrator also asked Ficalora to "undergo a complete neurological assessment by a consultant chosen by IBM, which may include formal testing of cognitive function." Ficalora's attorney refused this request and gave the following reason:

> [S]uch an examination is unnecessary given the ample medical evidence already in the file establishing disability. Mr. Ficalora has previously been examined by two (2) IBM chosen and paid medical consultants with respect to this claim.
>
> . . .
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> In addition to these two (2) reports by IBM paid medical consultants, you also have reports in your file from Drs. Swank, Blanck, Kornmesser, Stanfield, and Almarez. All of these reports support either Mr. Ficalora's symptomology, diagnosis of Multiple Sclerosis or prognosis and degree of disability.

On November 18, 1992, the Disability Plan panel again reviewed Ficalora's file and recommended that benefits be denied. The notice of denial stated the

following to Ficalora: "In your case, although you have a medical condition, you have not complied with our repeated requests for complete medical information sufficient to enable us to resolve the issues posed in [the June 12, 1992 notice]."

The Plan Administrator reviewed Ficalora's file and the recommendation of the Disability Plan panel, and decided to deny Ficalora benefits because Ficalora's "records contained insufficient objective medical evidence of [Ficalora's] inability to work."

Before the Plan Administrator could issue a notice to Ficalora, records from the Social Security Administration arrived at IBM, along with an updated letter from Dr. Blanck dated November 3, 1992. Dr. Blanck's letter stated that Ficalora's symptoms "have been chronic and slowly progressive." The Disability Plan panel met again on December 18, 1992, reconsidered Ficalora's file with this additional evidence, and yet again recommended a denial of benefits. The Plan Administrator again agreed with the Disability Plan panel. On January 21, 1993, the Plan Administrator issued a final denial of benefits letter, which stated that Ficalora did not present "satisfactory proof . . . that a disability . . . prevents the taking of any employment for pay or profit."

III

The majority states that the Plan Administrator did not clearly err in finding that Ficalora did not prove that multiple sclerosis prevented him from "the taking of any employment for pay or profit." In support of this assertion, the majority points to a single handwritten note by an IBM physician, Dr. Swanson, that Ficalora has "no clear physical limitation." Dr. Swanson based this opinion on his October 4, 1991, evaluation of Ficalora.

Dr. Swanson's handwritten note does not necessarily indicate that Ficalora had the ability to take any employment for pay or profit. It only states that Ficalora has no "clear" limitation. Thus, Dr. Swanson left open the possibility that a condition that was difficult to diagnose might account for Ficalora's claimed inability to take employment for pay or profit. In the present case, the medical doctors did not conclusively establish that Ficalora had MS until well after Swanson's October 4, 1991, examination of Ficalora.

Even assuming that Dr. Swanson's handwritten note does evidence his conclusion that Ficalora could take employment for pay or profit, that conclusion is contradicted by significant evidence that existed on October 4, 1991. For instance, Dr. Swank recommended in June 1991, "that [Ficalora] apply for retirement." Dr. Swank also stated the following on July 9, 1991: "Considering the

type of work [Ficalora] does, I do not believe he will be able to continue to do satisfactory work. However, he might be able to carry on at half-time, and that would perhaps be better for [him] as a first step towards retirement." Ficalora's attempt to work in a low-stress job for half-days, three days a week, however, ended in failure because exacerbated fatigue, burning in his feet, dizziness, nausea, and head and leg aches, prevented Ficalora from working.

Furthermore, it is undisputed that Ficalora suffered from a chronic form of MS that worsened over time.[6] If Ficalora's MS did not render him unable to take employment for pay or profit in October 4, 1991, it may have made him unable to take employment for pay or profit by early 1993, when Ficalora's application for benefits was considered. Thus, the important question before the Disability Panel and Plan Administrator was whether

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[6]A report by the U.S. Department of Health and Human Services about MS identifies two kinds of the disease: (1) exacerbating-remitting disease, characterized by "[p]eriods of deteriorating ability..... followed by periods of recovery;" and (2) chronic progressive disease, which has a "steady downhill course." Multiple Sclerosis--Medicine for the Public, (United States Department of Health and Human Services, Public Health Service, National Institutes of Health, and Warren Grant Magnuson Clinical Center), Aug. 1990, at section entitled "Symptoms."

Ficalora presented satisfactory proof of eligibility under the Disability Plan in early 1993.

Ficalora presented substantial evidence that he could not take employment for pay or profit in early 1993. First, the Social Security Administration decided on May 17, 1992, to consider Ficalora disabled by MS as of June 1, 1991, and to award him disability benefits. Second, the Social Security disability examiner found that Ficalora was "incapable of performing any past relevant work," and was "restricted by his residual functional capacity to less than sedentary work." Third, Ficalora's MRI revealed "extensive bilateral demyeliniating plaque disease." Fourth, Dr. Blanck stated in a November 3, 1992, letter the following: "[Ficalora's] symptoms have been chronic and slowly progressive. The course of MS is impossible to predict but the chronic progressive course speaks for a poor prognosis."

In my view, Dr. Swanson's brief, handwritten comment is not sufficient to support the Plan Administrator's decision to deny disability benefits to Ficalora. Nor do I see any other evidence that would support the Plan Administrator's decision. If this is the only evidence in support of the position of the Plan Administrator, I submit that he abused his discretion by denying Ficalora benefits under the Disability Plan.

I also believe that the majority places too onerous a burden of proof on Ficalora. He is not required to rebut every scintilla of evidence that might suggest he could do some small amount of work for a short period of time. The Plan Administrator abused his discretion because under any view of the evidence, Ficalora presented satisfactory proof to IBM that his MS prevented him from taking any employment for pay or profit.[7] I would reverse the district court's opinion affirming the Plan Administrator's decision.[8]

IV

It is undisputed that the Social Security Administration considers Ficalora disabled and entitled to

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[7]In hindsight, it is clear that Ficalora is eligible for benefits under the Disability Plan. On March 5, 1993, Ficalora voluntarily went to Dr. Swanson, the IBM neurologist, for another examination. This time, Dr. Swanson recommended that Ficalora seek retirement from his job at IBM. In May 1993, Dr. Swank reexamined Ficalora, and stated that Ficalora was "at present totally disabled for any type of gainful employment."

[8]Because I come to this conclusion, it is unnecessary to address the two issues that the majority chooses to resolve it its disposition: (1) whether the language of the Disability Plan places discretion in the hands of the Plan Administrator, meaning that the panel can only review the Plan Administrator's decision for an abuse of discretion; and (2) whether the Plan Administrator was required to consider evidence that Ficalora submitted for consideration after the Plan Administrator denied Ficalora disability benefits upon reconsideration.

benefits because he is unable to do even sedentary work. Several doctors have told Ficalora that he should retire. One of IBM's doctors concluded that Ficalora is "totally disabled for any type of gainful employment," although this last bit of evidence may have arrived late in the day. Even without that last bit of evidence, it is clear that Ficalora presented more than "satisfactory proof" that he could not take any employment for pay or profit due to his chronic, worsening MS.

In my view, this case is an example of a corporate bureaucracy disregarding the pain and suffering of its disabled employees. One might also conclude that Ficalora fell victim to an uncaring review scheme that places the "bottom line" above the interests of loyal, disabled employees. Ficalora is just such an employee, suffering the ravages of a chronic form of MS, who is denied the means to live his life with dignity. Regardless of how one views this case, it represents the shameful mistreatment of an employee forced to simultaneously battle MS and IBM.

Accordingly, I would reverse the district court and find that the Plan Administrator abused his discretion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT A. FICALORA, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES, INC., a Delaware corporation licensed to conduct business in Washington; and J.J. SINNOT, IBM Plan Administrator. Defendants.	CASE NO. C95-5342RJB ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; ORDER DENYING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on Defendants' Motion for Summary Judgment and on Plaintiff's Cross Motion for Summary Judgment. The court has considered all pleadings filed in support of and in opposition to the motions and the file herein.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact. T.W. Elec.

Service v. Pacific Contractors, 809 F.2d 626 (9th Cir. 1987); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). A motion for summary judgment must be granted against the nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T.W. Elec. Service, 809 F.2d at 630 (citations omitted).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial. Anderson, 477 U.S. at 2554. The non moving party must present specific, significant probative evidence, showing factual issues for trial, not simply "some metaphysical doubt." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); T.W. Elec. Service, 809 F.2d at 630, 632. In Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990), the U.S. Supreme Court stated that a District Court must resolve any factual issues of controversy in favor of the non-moving party only when the facts specifically attested by

that party contradict facts specifically attested by the moving party. Conclusory, nonspecific statements in affidavits are generally not sufficient. The court further held that "missing facts" will not be "presumed". Id. at 889.

FACTUAL BACKGROUND

The factual background of this case is complex and detailed. The court will present a brief summarization here:

Plaintiff was employed by Defendant International Business Machines, Inc. ("IBM") in March 1980. In October, 1988, he reported symptoms of pain and loss of vision in his right eye. At first, he was tentatively diagnosed as having optic neuritis. Although his vision improved, he continued to experience other symptoms, such as fatigue, weak and sore limbs, numbness and memory loss. A neurological examination showed the possibility that plaintiff suffered from Multiple Sclerosis ("MS"). Because plaintiff was satisfied with that diagnosis, he was not willing to undergo various medical tests to pinpoint the diagnosis.

In May, 1991, plaintiff stopped working and further medical examination supported the MS diagnosis. In June, 1991, plaintiff began processing his application for benefits

pursuant to IBM's Medical Disability Income Plan ("MDIP"). His application was considered, medical evaluations were conducted to determine if plaintiff met the criteria for disability under the MDIP, and volumes of correspondence accumulated between the parties and their various representatives. A portion of that correspondence pertained to plaintiff's reluctance to submit to medical testing and examination to support and enhance the documentation supporting his application. Plaintiff also restricted communication between his treating medical professionals and IBM's employees. The final result was that plaintiff's application was finally denied on January 21, 1993.

The plaintiff has brought this action, seeking reversal of the denial and damages resulting from allegations of breach of fiduciary duties of the MDIP administrators. IBM maintains that plaintiff never met the specific criteria for disability established in the MDIP and has not been cooperative in presenting the necessary supporting evidence of disability.

ISSUES

The primary issue presented in these motions is whether the MDIP Administrator abused his discretion by

denying plaintiff's disability benefits under the terms of the MDIP.

DISCUSSION

IBM contends that plaintiff failed to provide the necessary proof that he was disabled from taking any employment. IBM argues that the Plan Administrator's decision to deny plaintiff's application was reasonable and within his exercise of discretion allowed under the MDIP.

Plaintiff contends that he did provide the necessary objective medical evidence of both a medical disability and a disability which prevented him from taking any employment. He argues that his medical records were sufficient and that obtaining Social Security disability benefits proved that he was unable to engage in any gainful employment. He also contends that the Plan Administrator breached his fiduciary duty, under the MDIP, to grant his application.

The IBM MDIP Administrative Guide grants the Plan Administrator wide authority.

> The Plan Administrator has a wide scope of discretion with respect to the Plan, and its operation, having full power and authority to determine all matters arising in the administration, application and interpretation of the Plan (not inconsistent with the provisions of applicable law), including the

power to make final and conclusive decisions and interpretations.

Declaration of Andrea Epps, Ex. A. p. 153; Declaration of Michael A. Tarre. Eligibility for disability benefits under IBM's MDIP requires the following showing:

> 1. An employee will be considered disabled by giving satisfactory proof to IBM that a disability from any cause prevents the taking of any employment for pay or profit. Disability must have existed for at least nine months and be such that it presumably will continue during the employee's lifetime.
>
> 2. [T]he disability must be a <u>medical</u> disability ... there must be medical proof of a medical cause. Proof will not be deemed satisfactory without objective medical findings which substantiate a specific disease entity (physical or mental) as being the underlying cause of the disability. . . . Symptoms are not in themselves an acceptable substitute for objective medical findings, nor will a syndrome without significant objective findings be considered a diagnosis of a specific disease entity. There must be clinically-detected abnormalities in the individual, recognized as sufficient to account for functional impairment which presumably will last for the rest of the individual's life and which is severe enough to disable the individual from all gainful employment.

Declaration of Andrea Epps, Ex. A, p. 154-5; Declaration of Michael A. Tarre.

Where a plan grants the administrator with authority to determine whether an applicant is eligible for benefits under the terms of the plan, the district court may review the administrative decision for abuse of discretion. Atwood v. Newmont Gold Co., 45 F.3d 1317, 1321 (9th Cir. 1995); Taft v. Equitable Life Issur. Soc., 9 F.3d 1469, 1471 (9th Cir. 1993). This standard allows the court to "'review only the evidence presented to the [plan] trustees.'" Taft, 9 F.3d at 1471 (internal citations omitted). In applying this standard to administrative decisions under benefits plans, the court should determine if the decision was rendered "'without any explanation, or construe[d] provisions of the plan in a way that conflicts with the plain language of the plan,'" or "relies on clearly erroneous findings of fact in making benefit determinations," or the decision is "'so patently arbitrary and unreasonable as to lack foundation in factual basis.'" Id. at 1472-73 (internal citations omitted). Decisions that are contrary to evidence in the record do not necessarily amount to an abuse of discretion, nor is a previous grant of Social Security benefits conclusive. Id. at 1473-74 (internal citations omitted).

Plaintiff argues that the court should conduct a de novo review of the Plan Administrator's decision because he alleges that the denial of his application amounts to a breach of fiduciary duty, arising from an apparent conflict between the Plan Administrator's self interest in preserving plan assets and his obligation to the plaintiff beneficiary. He relies on Atwood, supra. As required by the Atwood decision, the plaintiff must show "material, probative evidence beyond the apparent conflict" which shows the breach of duty. Atwood, 45 F.3d at 1323. Other than his allegations, he has not produced "specific, significant probative evidence, showing factual issues for trial. . . ." Matsushita Elec. Indus. Co., 475 U.S. at 586. Therefore, the court will review the Plan Administrator's decision for abuse of discretion.

The court has carefully reviewed the MDIP record produced by IBM. See, Declaration of Andrea Epps, Ex. A. The court particularly reviewed the medical reports for evidence pertaining to plaintiff's ability to be employed. See, Ex. A, pp. 5, 18, 19, 20, 21, 23, 59-61, 62-63, 64, 65-67, 218-27, 244, 245, 246-48, 250-57. Of all those medical records only two mentioned plaintiff's ability to work. On July 9, 1991, Dr. Roy L. Swank stated that "[c]onsidering the type of work Bob does, I do not believe

he will be able to continue to do satisfactory work. However, he might be able to carry on at half-time, and that would perhaps be better for the patient as a first step toward retirement." Ex. A, p. 245. On December 4, 1991, Dr. Swank stated, "At that time [August 28, 1991] I advised him to stop work . . . I have recommended to the patient that he apply for retirement." Ex. A., p. 64. The other evidence of plaintiff's ability to work comes from the determination of the Social Security Administration to grant him disability benefits.

In applying the abuse of discretion standard, as established by the Ninth Circuit, the court cannot find that the decision of IBM Plan Administrator was based on clearly erroneous factual findings, was beyond the power and authority set forth in the MDIP, or conflicts with the plain language of the MDIP. The records are replete with plaintiff's reluctance to take medication which might relieve some of his symptoms, and refusal to present himself for further examination. Although the court is sympathetic with plaintiff's desire to avoid repeated examinations, the nature of MS requires continued treatment and monitoring by medical professionals. If plaintiff wishes to receive disability benefits from IBM, he should present the required medical evidence which shows

his inability to be employed for pay or profit. In sum, no factual issues are presented for trial and the defendants' motion for summary judgment should be granted. This decision should not prejudice plaintiff from renewing his application for benefits under MDIP, if appropriate. Plaintiff's claims against the defendants should be dismissed.

Because of this determination, the remaining issues raised by the plaintiff are moot and will not be discussed here.

For the above stated reasons, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is **GRANTED**. Plaintiff's claims are **DISMISSED**.

It is further

ORDERED that Plaintiff's Cross Motion for Summary Judgment is **DENIED**.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 24th day of January, 1996.

Robert J. Bryan
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. FICALORA,	) No. 96-35229
Plaintiff-Appellant,	)
	) D.C. No. CV-95-05342-RJB
v.	)
INTERNATIONAL BUSINESS MACHINES CORPORATION, a Delaware corporation licensed to conduct business in Washington; J. J. SINNOTT, IBM Plan Administrator; INTERNATIONAL BUSINESS MACHINES, INC., MEDICAL DISABILITY INCOME PLAN; CHASE MANHATTAN BANK, Trustee of MDIP; MICHAEL A. TARRE, MDIP Administrator; ARNOLD J. KAMINER; CHARLES D. GROSE, M.D.; STEVE REDMOND, M.D.; W.R. MATSON; D. A. PEGUERO; T.L. RICHARDS; D. B. ROBBINS, M.D.	) ORDER
Defendants-Appellees.	)

Before: WRIGHT, PREGERSON and THOMPSON, Circuit Judges.

Judges Wright and Thompson have voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc, and Judge Wright so recommends. Judge Pregerson has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on that suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.